

May 12, 2011

**VIA ECFS**

Marlene H. Dortch, Esq.  
Secretary  
Federal Communications Commission  
Office of the Secretary  
445 Twelfth Street, S.W., Room TW-A325  
Washington, D.C. 20554

Re: ***In re Applications of AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses & Authorizations, WT Dkt No. 11-65 – Objection to Disclosure of Confidential and Highly Confidential Information to Scott A. Bursor, L. Timothy Fisher, Joseph I. Marchese, and Sarah N. Westcot***

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Dear Ms. Dortch:

Pursuant to a Protective Order for the AT&T/T-Mobile USA proceeding,<sup>1</sup> AT&T Inc. (“AT&T”), Deutsche Telekom AG (“Deutsche Telekom”), and T-Mobile USA, Inc. (“T-Mobile”; collectively with AT&T and Deutsche Telekom, “Applicants”) object to the Acknowledgments of Confidentiality (“Acknowledgments”) filed in the above-referenced docket on May 9, 2011 on behalf of Scott A. Bursor, L. Timothy Fisher, Joseph I. Marchese, and Sarah N. Westcot from the law firm of Bursor & Fisher, P.A. (collectively, “Bursor Firm”).<sup>2</sup> The Bursor Firm is actively litigating unrelated class actions against AT&T.<sup>3</sup> Providing them access to confidential and highly confidential information in this proceeding raises precisely the same risks as providing access to counsel engaged in Competitive Decision-Making.<sup>4</sup> Accordingly, Applicants object to their Acknowledgments.

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<sup>1</sup> *In re Applications of AT&T Inc. & Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses & Authorizations*, WT Dkt No. 11-65, NRUF/LNP Protective Order, DA 11-711 (WTB rel. Apr. 18, 2011) (“*Protective Order*”).

<sup>2</sup> See Letter from Joseph I. Marchese, Bursor & Fisher, P.A., to Marlene H. Dortch, Esq. (May 9, 2011).

<sup>3</sup> E.g., *Hendricks v. AT&T Mobility*, No. C11-00409 (N.D. Cal. filed Jan. 27, 2011) (putative class action alleging artificial inflation of data usage and charges); *Thein v. AT&T Mobility*, No. SACV10-01796 (C.D. Cal. filed Nov. 22, 2010) (putative class action alleging artificial inflation of data usage and charges); *Cook v. AT&T Mobility*, No. CV10-08870 (C.D. Cal. filed Nov. 18, 2010) (putative class action alleging artificial inflation of data usage and charges).

<sup>4</sup> Undefined capitalized terms have the meanings supplied in the *Protective Order*.

Mr. Bursor has run a highly successful business filing class action lawsuits against AT&T, T-Mobile, and other wireless carriers over the past few years. The following are among the cases he has litigated:

- Mr. Bursor and his co-counsel garnered a \$5.7 million attorneys' fee as part of the settlement in *Mendoza v. Cingular Wireless LLC*.<sup>5</sup>
- "Mr. Bursor negotiated and obtained court-approval for a nationwide class action settlement in *Nguyen v. T-Mobile USA, Inc.* . . ."<sup>6</sup>
- "Ayyad v. Sprint Spectrum L.P. Mr. Bursor was the lead trial lawyer representing a class of approximately 1.9 million California consumers who were charged an early termination fee under a Sprint cellphone contract, asserting claims that such fees were unlawful liquidated damages under the California Civil Code, as well as other statutory and common law claims. After a five-week combined bench-and-jury trial, the jury returned a verdict in June 2008 and the Court issued a Statement of Decision in December 2008 awarding the plaintiffs more than \$299 million. Sprint's appeal from this trial is pending."<sup>7</sup>
- "White v. Cellco Partnership d/b/a Verizon Wireless. Mr. Bursor was the lead trial lawyer representing a class of approximately [sic] 1.4 million California consumers who were charged an early termination fee under a Verizon cellphone contract, asserting claims that such fees were unlawful liquidated damages under the California Civil Code, as well as other statutory and common law claims. In July 2008, after Mr. Bursor presented plaintiffs [sic] case-in-chief, rested, then cross-examined Verizon's principal trial witness, Verizon agreed to settle the case for a \$21 million cash payment and agreed to an injunction restricting Verizon's ability to impose early termination fees in future subscriber agreements."<sup>8</sup>

So far as we are aware, Mr. Bursor previously has not participated as counsel in any FCC proceeding for approval of a merger or acquisition. Indeed, in the last decade, Mr. Bursor or his firm appear to have participated only in three declaratory ruling proceedings before the Commission.<sup>9</sup> Each was related to litigation Mr. Bursor had pending before the courts.

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<sup>5</sup> No. J.C.C.P. 4332 (Cal. Super. Ct. settlement entered July 21, 2010) (subsequent history omitted).

<sup>6</sup> Recent Cases, <http://www.bursor.com/cases.php> (last visited May 12, 2011).

<sup>7</sup> Trial Results, <http://www.bursor.com/trialresults.php> (last visited May 12, 2011).

<sup>8</sup> *Id.*

<sup>9</sup> See *In re BellSouth's Request for Declaratory Ruling the State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, WC Dkt

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Having heretofore had no interest in FCC transfer of control or assignment proceedings, Mr. Bursor and his colleagues have now filed Acknowledgments of Confidentiality seeking access to highly confidential information in the record of this proceeding. This was a noteworthy occurrence. Counsel for Applicants recall no other instance in the numerous transactions in which they have participated where a class action lawyer, representing individuals, has sought access to confidential or highly confidential information in the record.

Upon inquiry from counsel for AT&T as to what party to this proceeding had retained him, Mr. Bursor said that he had been retained by dozens of AT&T and T-Mobile customers to help them determine whether they wish to participate in this proceeding. He identified one – Astrid Mendoza, a named plaintiff in two previous class actions Mr. Bursor had filed against AT&T.<sup>10</sup> The sudden appearance of a class action lawyer – with no prior involvement in FCC merger or acquisition proceedings and representing largely unnamed individuals with no apparent private interest to motivate them to pay counsel to oppose this transaction – raises concerns about how the confidential and highly confidential information in the docket will be used.

The *Protective Order* is designed to address those concerns. It bars counsel whose “activities, association, or relationship with any of its clients involve advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship” with Applicants from obtaining access to highly confidential information in this proceeding.<sup>11</sup> Such counsel have the incentive and ability to take the information they learn in this proceeding and apply it to the business decisions their clients make. And the risk of competitive harm is sufficiently great that the Commission has concluded that it is unreasonable to depend on their efforts to keep what they have learned from influencing the business decisions with which they are involved. Thus, the Commission denies

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No. 03-251; *In re SunCom Wireless Operating Company, L.L.C. Petition for Declaratory Ruling and Debra Edwards Opposition and Cross Petition for Declaratory Ruling Seeking Determination of Whether State Law Claims Regarding Early Termination Fees Are Subject to Preemption Under 47 U.S.C. Section 332(c)(3)(A)*, WT Dkt No. 05-193; *In re CTIA Request for Declaratory Ruling Seeking Determination of Whether Early Termination Fees Are “Rates Charged” Within 47 U.S.C. Section 332(c)(3)(A)*, WT Dkt No. 05-194. These three proceedings were the only ones found in a search of the Commission’s Electronic Comment Filing System for filings received on or after May 10, 2000 with “Bursor” in the Name of Filer, Lawfirm Name, or Attorney/Author Name fields.

<sup>10</sup> *Mendoza v. Cingular Wireless LLC*, No. J.C.C.P. 4332 (Cal. Super. Ct. settlement entered July 21, 2010) (subsequent history omitted); *Ayyad v. Cingular Wireless LLC*, No. J.C.C.P. 4332 (Cal. Super. Ct. filed Feb. 11, 2004) (including Ms. Mendoza as a class representative).

<sup>11</sup> *Protective Order* ¶¶ 3-4.

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access to confidential and highly confidential information to such counsel to keep them from giving their clients an unfair advantage at the expense of Applicants, other carriers, and the public interest in fair competition.

The Bursor Firm stands in just such a position relative to AT&T and other wireless carriers. With a steady stream of litigation against AT&T and other members of the industry, the Bursor Firm will have the incentive and ability to use the information they learn in this proceeding in those other cases. And it is equally unreasonable to expect that they will be able to forget what they learn or “split their brains in two” to keep the confidential and highly confidential information from being used unfairly to the detriment of Applicants and other carriers.

For these reasons, the Commission should dismiss or deny the Acknowledgments of Confidentiality submitted by the Bursor Firm.

Respectfully submitted,

/s/ Peter J. Schildkraut

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cc: Attached Service List

## CERTIFICATE OF SERVICE

I hereby certify that on this twelfth day of May, 2011, I caused true and correct copies of the foregoing to be served by electronic mail upon:

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